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U.N. Convention on the Law of the Sea: Living Resources Provisions

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Summary

The United Nations Convention on the Law of the Sea established a comprehensive international legal framework for governing activities related to the world's oceans. UNCLOS was agreed to in 1982, but the United States never became a signatory nation. This report describes provisions of UNCLOS relating to living marine resources and discusses how these provisions comport with current U.S. marine policy. As presently understood and interpreted, these provisions generally appear to reflect current U.S. policy with respect to living marine resource management, conservation, and exploitation. Based on these interpretations, they are generally seen as *not* imposing significant new U.S. obligations, commitments, or encumbrances, and are seen as providing several new privileges, primarily related to participation in commissions developing international ocean policy. No new domestic legislation appears to be required to implement the living resources provisions of UNCLOS.

A possible benefit of U.S. ratification would be the international community's anticipated positive response to such U.S. action. In addition, early U.S. participation in the development of policies and practices of the International Tribunal for the Law of the Sea, the Commission on the Limits of the Continental Shelf, and the International Seabed Authority could help to forestall future conflicts related to living marine resources. On the other hand, some U.S. interests view U.S. ratification as potentially complicating enforcement of domestic marine regulations, and remain concerned that UNCLOS's language concerning arbitrary refusal of access to surplus (unallocated) living resources might be a potential source of conflict (in addition to concerns about other provisions of the Convention). These uncertainties reflect the absence of any comprehensive assessment of the social and economic impacts of UNCLOS implementation by the United States.

The Senate may choose to address the ambiguities of UNCLOS with its power to make declarations and statements, as provided for in Article 310 of the Convention. Such declarations and statements can be useful in promulgating U.S. policy and putting other nations on notice of U.S. interpretation of UNCLOS.

The Senate Committee on Foreign Relations reported UNCLOS on December 19, 2007, but no action was taken by the entire Senate. In the 111th Congress, then-Secretary of State Hillary Clinton, at her confirmation hearing before the Senate Committee on Foreign Relations on January 13, 2009, acknowledged that U.S. accession to UNCLOS would be an Obama Administration priority. Later in this confirmation hearing, then-Senator John Kerry, the committee chair, confirmed that UNCLOS would also be a committee priority. However, the Senate took no action on UNCLOS during the 111th Congress. In the 112th Congress, the Administration continued to encourage Senate action on UNCLOS, and Senator John Kerry, chairman of the Senate Committee on Foreign Relations, was guardedly optimistic, but no action was taken. In the 113th Congress, there has been little or no mention of UNCLOS and no actions have been taken to ratify the treaty.

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On November 16, 1994, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) entered into force, but not for the United States. UNCLOS was the culmination of more than 10 years of intense negotiation. However, the United States chose not to participate in UNCLOS in the early 1980s because of provisions dealing with deep seabed mineral resources beyond national jurisdiction. After a 1994 agreement amended parts of UNCLOS dealing with deep seabed mineral resources, the UNCLOS, Annexes, and Agreement package was formally submitted to the U.S. Senate on October 7, 1994, for advice and consent to accession and ratification (Senate Treaty Doc. 103-39). However, the Senate took no action. More recently, the George W. Bush Administration reiterated support for U.S. accession to UNCLOS. In the 110th Congress, UNCLOS was reported on December 19, 2007, by the Senate Committee on Foreign Relations (S.Exec.Rept. 110-9), but the Senate did not take up the measure for ratification.

In the 111th Congress, then-Secretary of State Hillary Clinton, at her confirmation hearing before the Senate Committee on Foreign Relations on January 13, 2009, acknowledged that U.S. accession to UNCLOS would be an Obama Administration priority. Later in this confirmation hearing, then-Senator John Kerry, the committee chair, confirmed that UNCLOS would also be a committee priority.[1] However, the Senate took no action on UNCLOS during the 111th Congress. In the 112th Congress, the Administration continued to encourage Senate action on UNCLOS, but again no action was taken. In the 113th Congress, there has been little or no mention of UNCLOS and no actions have been taken to ratify the treaty.

UNCLOS and a subsequent 1994 Agreement on deep seabed mining are extensive, complex documents touching on a wide range of policy issues and U.S. interests. From the perspective of the United States, some of the most significant areas addressed by the Convention deal with naval power and maritime commerce, coastal state interests, marine environment protection, marine scientific research, and international dispute settlement.[2] A number of issues may arise during Senate consideration of UNCLOS, including the question of whether the 1994 Agreement adequately addresses the deep seabed portions of the Convention that were at the core of U.S. opposition to the original UNCLOS. Policy issues relating to areas beyond living resources that are likely to draw Senate attention are discussed more fully in CRS Report RS21890, *The U.N. Law of the Sea Convention and the United States: Developments Since October 2003*, by Marjorie Ann Browne, and include

- the dispute settlement process set forth in UNCLOS and the U.S. declarations on dispute settlement;
- the relationship between U.S. law and various parts of UNCLOS regarding use of the world's oceans;
- U.S. acceptance of the UNCLOS/Agreement interpretation and application of the common heritage of mankind concept;
- the provisional application procedures as a precedent in the U.S. treaty process;
- the nature of U.S. commitments undertaken by a decision of the International Seabed Authority (ISA) Council—what does a council decision commit the U.S. government to do?

[1] This hearing is available at http://www.gpo.gov/fdsys/pkg/CHRG-111shrg54615/pdf/CHRG-111shrg54615.pdf. See especially pages 54-55, 113-114, 182, and 218.

[2] Additional information on other provisions of the Convention is available in CRS Report RS21890, *The U.N. Law of the Sea Convention and the United States: Developments Since October 2003*, by Marjorie Ann Browne.

- should Congress have a role and if so, under what circumstances; and
- the cost and financing of the ISA and U.S. participation therein, now and in the future.

The remainder of this report focuses on the living marine resource provisions of UNCLOS.

Living Resources Provisions

The living resources provisions of UNCLOS (i.e., those concerning fish, shellfish, sea turtles, and marine mammals) recognize international interdependence on these resources and provide a framework for their cooperative and sustainable management. These provisions, comprising Articles 61 through 73, deal specifically with:

- conservation (Article 61),
- exploitation (Article 62),
- transboundary and straddling stocks (Article 63),
- highly migratory stocks (Article 64),
- marine mammals (Article 65),
- anadromous stocks (Article 66),
- catadromous stocks (Article 67),
- sedentary species (Article 68),
- rights of landlocked nations (Article 69),
- rights of geographically disadvantaged nations (Article 70),
- non-applicability of Articles 69 and 70 (Article 71),
- restrictions on transfer of rights (Article 72), and
- enforcement by coastal nations (Article 73).

In addition, sedentary continental shelf species are more specifically addressed in Article 77(4), living resources on the high seas are considered in Articles 116-120, and marine habitat protection is provided by Articles 192-196. As presently understood and interpreted, these provisions generally reflect current U.S. policy with respect to living marine resource management, conservation, and exploitation as reflected primarily in the Magnuson-Stevens Fishery Conservation and Management Act.[3] However, increasingly complex ocean policy is being formulated within the UNCLOS regime, without strong U.S. participation to address U.S. concerns.

In support of current U.S. maritime policy, the U.S. government, particularly the U.S. Coast Guard, currently expends considerable resources enforcing U.S. and international fishing and living resources laws in the U.S. Exclusive Economic Zone (EEZ) off both the Atlantic and Pacific coasts as well as Hawaii, Howland-Baker, Guam, Northern Marianas Islands, Puerto Rico, and other remote U.S. EEZ areas and in the high seas driftnet area of the western Pacific. Recognizing the existing level of U.S. commitment and based on current U.S. interpretation, the living resource provisions of UNCLOS are generally not seen as imposing significant new U.S. obligations, commitments, or encumbrances involving living resources and their management. UNCLOS could provide several new privileges, primarily related to participation in commissions developing international ocean policy. Some measure of increased stability in international living

[3] 16 U.S.C. §§1801 et seq.

marine resource policy can be inferred as a beneficial aspect of U.S. participation in the UNCLOS regime. It appears that no new domestic legislation would be required to implement the living resources provisions of UNCLOS.

Conservation and Exploitation

UNCLOS recognizes the broad authority of a coastal nation over living resources within its territorial sea and exclusive economic zone (EEZ) to a maximum of 200 miles seaward from the baselines used to measure the territorial sea.[4] In managing living resources, coastal nations are to determine allowable catches and promote optimal resource use. To this end, drafters of UNCLOS were intentionally ambiguous in their attempt to make UNCLOS acceptable to a broad range of constituents. Thus, the terms *maximum sustainable yield* (Article 61) and *optimum utilization* (Article 62) are open to broad interpretation and may require further definition to provide additional guidance on how sustainable management of living marine resources is to be attained.[5]

Except for Article 65, UNCLOS exhibits bias toward optimal exploitation of the resource, with little explicit recognition of non-consumptive management objectives which might reduce harvests to substantially less than optimal or maximum sustainable yield levels.[6] Articles 61(2) and 61(3) do provide a mandatory obligation to ensure that living resources are not endangered by over-exploitation and that threatened species are restored to levels which can produce their maximum sustainable yield. In addition, the phrase "as qualified by relevant environmental and economic factors," appearing in Article 61(3), provides a basis for harvesting at rates both above or below the maximum sustainable yield. However, the subsequent examples of how this qualification is to be interpreted focus on ways to protect against overharvesting or other possible justifications for exceeding the maximum sustainable yield, rather than providing any explicit acknowledgment that valid reasons may exist for refraining altogether from harvesting to achieve non-consumptive goals (e.g., tourism in reef environments or biodiversity conservation) or to respond to moral/ethical concerns (e.g., beliefs that large sharks, dolphins, and whales should not be killed). Regardless, determination of allowable catch within a coastal nation's EEZ is not subject to compulsory procedures leading to binding dispute settlement.

Under UNCLOS, if a coastal nation is unable to harvest the entire allowable catch, other nations *must* be given access to these resources, subject to appropriate terms and conditions. Resource populations are to be managed such that they can produce harvests at maximum sustainable yield levels. The U.S. Fishery Conservation and Management Act of 1976 (16 U.S.C. §§1801 et seq., now known as the Magnuson-Stevens Act) was crafted to parallel closely most of the draft UNCLOS's provisions for living resources.[7]

UNCLOS, in Article 61(4), encourages attention to *associated or dependent species*. If interpreted narrowly, this might encompass incidental bycatch concerns by calling for consideration of these associated or dependent species so that their reproduction is not seriously threatened. More broadly, however, attention to ocean ecosystems would reflect the highly complex web of biological relationships where food chain and commensal associations create

[4] However, coastal nation sovereign rights over sedentary species (see "Sedentary Species," below) may extend beyond 200 miles, to the extent of the continental shelf.

[5] With a view to this broad interpretation, some nations have used the maximum sustainable yield and optimum utilization language to justify commercial whaling.

[6] The approach taken in Article 65 of UNCLOS explicitly recognizes the rights of coastal nations to prohibit the exploitation of marine mammals.

[7] Initial work on UNCLOS began in 1958, so the essence of many provisions had been agreed to by 1976, when the U.S. Fishery Conservation and Management Act was enacted.

intricate interdependencies. Some marine conservation regimes, such as those under the Convention on the Conservation of Antarctic Marine Living Resources, are sensitive to these concerns and attempt to manage living marine resources from an "ecosystem" approach.

Straddling and Transboundary Fish Stocks

Straddling fish stocks (ranging between national EEZs and international waters) and transboundary stocks are to be managed cooperatively through bilateral or multilateral international agreements involving coastal nations through whose waters these fish stocks range as well as any nations fishing these stocks in international waters.[8] The United States acted in concert with these provisions by negotiating the multilateral Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (Senate Treaty Doc. 103-27) to govern harvest and management of fish stocks migrating between international waters in the Bering Sea (the "donut hole") and adjacent waters under national jurisdiction.[9] An example of an effective bilateral agreement on a transboundary fish stock is the 1953 Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea between the United States and Canada. Concerns remain over attempts to cooperatively manage anchovy fisheries along the United States-Mexico Pacific boundary. The 1995 Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[10] (Senate Treaty Doc. 104-24) more specifically addresses concerns for these stocks in a manner consistent with UNCLOS.[11]

Highly Migratory Species

Prior to 1990, the U.S. position on certain highly migratory species was contrary to that of UNCLOS in that the United States did not claim national jurisdiction over tunas. However, the Fishery Conservation Amendments of 1990 (P.L. 101-627) modified U.S. policy to be consistent with UNCLOS by amending the Magnuson-Stevens Act to extend national jurisdiction to include tunas. Annex I to UNCLOS provides a list of species designated as highly migratory. Article 64 of UNCLOS calls for cooperative management of highly migratory species to ensure their conservation and promote their optimum harvest, within and beyond the EEZ.

The United States is party to agreements in both the Atlantic and Pacific consistent with the provisions of Article 64. In the Pacific, the 1950 Convention Between the United States of America and the Republic of Costa Rica for the Establishment of an Inter-American Tropical Tuna Commission serves this purpose by involving 21 member nations and 1 cooperating non-party (Cook Islands);[12] a 2003 Convention for the Strengthening of the Inter-American Tropical Tuna Commission (Antigua Convention) has been ratified by 14 nations. The 1966 International

[8] For more detail on individual international agreements, see http://www.nmfs.noaa.gov/ia/resources/2012_int_Agr_book.pdf.

[9] However, the Central Bering Sea Convention does not provide for compulsory dispute settlement. The Senate agreed to a resolution of advice and consent to ratification of this convention on October 7, 1994. This agreement entered into force on December 8, 1995.

[10] Hereinafter referred to as the "Straddling Stocks Agreement."

[11] The Senate agreed to a resolution of advice and consent to ratification of this agreement on June 27, 1996. This agreement entered into force on December 11, 2001.

[12] See *International Agreements Concerning Living Marine Resources of Interest to NOAA Fisheries*, available at http://www.nmfs.noaa.gov/ia/resources/2012_int_Agr_book.pdf.

Convention for the Conservation of Atlantic Tunas involves 48 contracting parties and 5 cooperating non-contracting entities. The 1995 Straddling Stocks Agreement more specifically addresses concerns for highly migratory stocks in a manner consistent with UNCLOS and involves 80 nations. More recently, the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean was signed by 19 nations, and entered into force on June 19, 2004; the commission implementing this convention now has 25 members as well as 11 cooperating non-members. The United States is a signatory to all these agreements and has ratified all of them except the Antigua Convention.[13]

Marine Mammals

Article 65 of UNCLOS provides that coastal nations may manage and regulate marine mammals more strictly than otherwise provided by UNCLOS. International cooperation for conservation is mandated, with specific direction that cetaceans (i.e., whales and dolphins) be conserved, managed, and studied internationally. Article 120 extends this understanding to marine mammals on the high seas. Whales and dolphins are identified in the list of highly migratory species provided in Annex I to UNCLOS.

Article 65 calls for cooperation with a view to "conservation." In the case of cetaceans, nations are to work through "appropriate international organizations" for their conservation. Protection for most cetaceans is provided currently through a moratorium on commercial whaling imposed by the International Whaling Commission (IWC) under the authority of the International Convention for the Regulation of Whaling. Additional protection for most of the large whales, in the form of trade restrictions, derives from their inclusion in appendixes of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[14]

Sea Turtles

Sea turtles are considered indirectly under UNCLOS, because they are associated with harvested species,[15] and because most sea turtle species are recognized internationally as being either threatened or endangered. Article 61(2)/61(4) provides some protection for threatened or endangered populations as well as species associated with harvested species. However, the "shall take into consideration" language of Article 61(4) does not mandate strong protective measures. Article 194(5) encourages habitat protection beneficial to threatened and endangered species. Regardless of UNCLOS provisions and similar to whales as discussed above, extensive protection for sea turtles, in the form of trade restrictions, derives from their inclusion in the Appendices of CITES.

[13] Although the Senate provided advice and consent on the Antigua Convention in 2005, the United States is not in a position to sign and deposit an instrument of ratification and become a party to the convention until Congress passes implementing legislation. Without implementing legislation, the U.S. government would not have the authorities necessary to ensure that it would be able to fully satisfy the commitments it would assume under the Antigua Convention. In the 112th Congress, Antigua Convention implementing legislation was introduced as Title IV of S. 52 and Title II of H.R. 4100. The Antigua Convention entered into force on August 27, 2010.

[14] Additional information on CITES is available in CRS Report RL32751, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): Background and Issues*, by Pervaze A. Sheikh and M. Lynne Corn.

[15] Sea turtles may drown when caught in fishing gear.

Anadromous Stocks

Anadromous species spend most of their lives in the ocean, but enter freshwater to spawn. Salmon, sturgeon, and striped bass are some of the anadromous species of interest to the United States. UNCLOS assigns primary interest in and responsibility for anadromous fish stocks to the nations in whose rivers the stocks originate. Fishing for anadromous stocks is prohibited on the high seas, except in cases where economic dislocation might result. Coastal nations through whose waters anadromous fish migrate are required to cooperate with the nations wherein the anadromous stocks originated. Enforcement of regulations concerning anadromous fish stocks beyond the EEZ is to be accomplished through negotiated agreement. The United States actively participates in a cooperative bilateral salmon agreement with Canada as well as broader regional agreements for both Atlantic and Pacific stocks.[16]

Catadromous Species

Catadromous species spend most of their lives in freshwater, but enter the ocean to spawn. American eels are the primary catadromous species of interest to the United States. UNCLOS gives the coastal nations where these species spend most of their lives the responsibility for managing them, and prohibits harvesting them on the high seas. International cooperation is required where these species migrate through more than one EEZ.

Sedentary Species

Sedentary species are addressed in Article 77(4) of UNCLOS. Coastal nation jurisdiction over sedentary species may extend beyond 200 miles, to the extent of the continental shelf (as defined in Article 76). Although the meaning of sedentary is defined, no listing of exactly which species are to be considered sedentary is provided in UNCLOS. Thus, controversy may arise over access to certain species,[17] and dispute resolution provided by UNCLOS may become necessary. Given the current differences of opinion and limited data, additional scientific research may be required to better understand the sedentary nature of certain shellfish, such as scallops.

Protection for sedentary species is further promoted by Article 136, which states that the seabed, ocean floor, and subsoil beyond the limits of national jurisdiction are the common heritage of humankind. This implies an obligation to protect the seamounts and hydrothermal vents that support unique ecosystems. This view receives additional support from Article 145, on protecting the marine environment of the seabed, ocean floor, and subsoil beyond the limits of national jurisdiction and conserving the natural resources of the seabed and ocean floor to prevent damage to flora and fauna.

Other concerns may arise where the continental shelf beyond 200 miles is shared between nations. For example, how might potential competing Russian and U.S. interests in developing a snail fishery in the Bering Sea's enclosed international waters (the "donut hole") be handled under the UNCLOS regime?

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[16] Treaty Between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon, Ottawa, 1985 (TIAS 11091); Convention for the Conservation of Salmon in the North Atlantic Ocean, Reykjavik, 1982 (TIAS 10789); and Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, Moscow, 1992 (Senate Treaty Doc. 102-30).

[17] An example was a July 1994 dispute with Canada when two U.S. fishing vessels harvested Icelandic scallops on extensions of the Canadian continental shelf outside Canada's 200-mile jurisdiction. U.S. officials conceded in November 1994 that the Canadian interpretation, that Icelandic scallops were sedentary, was correct.

High Seas

UNCLOS preserves the freedom to fish on the high seas, subject to other treaty obligations; the rights, duties, and interests of coastal nations; and an obligation to cooperate in conserving and managing high seas living resources. UNCLOS's obligation to cooperate in the conservation and management of high seas living resources would represent a new commitment for the United States, and is subject to compulsory dispute settlement should conflict arise. The 1995 Straddling Stocks Agreement addresses specific concerns for the conservation and management of high seas stocks in a manner consistent with UNCLOS. In addition, the Senate agreed to a resolution of advice and consent to ratification for the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Senate Treaty Doc. 103-24) on October 6, 1994. This agreement, developed under the leadership of the U.N. Food and Agriculture Organization, reflects the intent of UNCLOS and extends its reach by limiting the reflagging of vessels participating in high seas fisheries. This agreement entered into force on April 24, 2003, and there are currently 39 parties to the agreement.[18]

Access by Disadvantaged Nations

Although UNCLOS provides special access rights to surplus living marine resources within coastal nation EEZs for nearby developing nations that are landlocked or geographically disadvantaged, no nations meeting these criteria are believed to exist within the same region as the United States. Regional, subregional, or bilateral agreements would be negotiated to guide the provision of an equitable allocation to any such disadvantaged nation. Regardless, it is the coastal nation alone that determines whether any harvestable surplus exists within its EEZ, and such a decision may not be challenged through dispute settlement procedures.

Marine Habitat Protection

Article 192 states a general obligation of parties to UNCLOS to protect and preserve the marine environment, while Article 193 states that resource exploitation is to be conducted within this obligation to protect and preserve the marine environment. This becomes more specific in Article 194(5), which calls attention to measures "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life." Additional protection is provided by Article 61(4), which encourages attention to bycatch and incidental catch by calling for commercial fishermen to consider associated or dependent species so that their reproduction is not seriously threatened. Preventing intentional or accidental introduction of harmful alien or exotic species by all measures necessary is directed by Article 196. In addition, Article 206 requires an environmental impact assessment where parties to UNCLOS have reasonable grounds for believing that planned activities may lead to substantial pollution or harmful changes to the marine environment.[19]

The various articles of UNCLOS that address pollution are relevant to marine habitat protection. Parties to UNCLOS are to prevent, reduce, and control pollution of the marine environment (Article 194) from land-based sources (Article 207); seabed activities under their jurisdiction (Article 208); and vessels (Article 211). The expansion of enforcement rights of port/coastal

[18] For updated status, see http://www.fao.org/fileadmin/user_upload/legal/docs/1_012s-e.pdf.

[19] Critics have alleged that U.S. and NATO use of low-frequency active sonar without adequate impact assessment is a breach of Article 206. See Elena McCarthy, *International Regulation of Underwater Sound* (Boston: Kluwer Academic Publishers, 2004).

nations (Articles 218 and 220) is an important concession to nations, such as the United States, that have a small merchant fleet and a large and productive EEZ.

Article 136 states that the seabed, ocean floor, and subsoil beyond the limits of national jurisdiction are the common heritage of humankind, implying an obligation to protect seamounts and hydrothermal vents that support unique ecosystems. Article 145, on protecting the marine environment of the seabed, ocean floor, and subsoil beyond the limits of national jurisdiction from pollution as well as protecting and conserving the natural resources of the seabed and ocean floor to prevent damage to flora and fauna, provides additional support for protection of these unique habitats.

Dispute Settlement for Living Resources

Article 297(3)(b) offers assurances that domestic EEZ fisheries matters cannot be forced to undergo compulsory dispute settlement proceedings leading to binding decisions under UNCLOS:

> the coastal State shall not be obliged to accept the submission to such settlement [compulsory procedures leading to binding decisions] of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

Article 297(3)(b) does provide that disputes can be submitted to conciliation when (1) a coastal nation has failed to properly conserve and manage EEZ living resources such that they become seriously endangered; (2) a coastal nation has arbitrarily refused to determine allowable catches and capacity to harvest species desired by a foreign nation; or (3) a coastal nation has arbitrarily refused to allocate a declared surplus in a living resource to any foreign nation. However, Article 297(3)(c) prohibits a conciliation commission from substituting its discretion for that of the coastal nation. Conciliation procedures are outlined in Article 7(2) of Annex V, which states that a conciliation commission's report, including its conclusions and recommendations, is not binding.

The history of the International Tribunal for the Law of the Sea (ITLOS),[20] however, merits scrutiny. Article 292, providing for the prompt release of vessels, allows for application to the ITLOS for the prompt release of any vessel flagged by one member that is detained by another member. The vast majority of the cases ITLOS has heard so far have been applications for the prompt release of fishing vessels that have been accused of unauthorized fishing in the EEZ of a member.[21] Some observe that these cases may really represent fishery disputes in disguise.[22]

Conclusion

As presently understood and interpreted, the LOS provisions generally appear to reflect current U.S. policy with respect to living marine resource management, conservation, and exploitation.

[20] The International Tribunal for the Law of the Sea, composed of 21 independent members, is an independent judicial body established by UNCLOS to adjudicate disputes arising out of the interpretation and application of UNCLOS. Additional information is available at http://www.itlos.org/index.php?id=2&L=0.

[21] For further discussion of ITLOS actions, see the testimony of Professor Bernard H. Oxman, University of Miami School of Law, before the Senate Committee on Foreign Relations on October 4, 2007, available at http://www.gpo.gov/fdsys/pkg/CHRG-110shrg45282/pdf/CHRG-110shrg45282.pdf, beginning on page 91.

[22] Howard S. Schiffman, "UNCLOS and Marine Wildlife Disputes: Big Splash or Barely a Ripple?" *Journal of International Wildlife Law and Policy*, v. 4, no. 3 (2001): 257-278.

Based on these interpretations, the living resource provisions of UNCLOS are generally not seen as imposing significant new U.S. obligations, commitments, or encumbrances involving living resources and their management. One possible benefit of U.S. ratification would be the international community's anticipated positive response to such U.S. action. In addition, U.S. accession to UNCLOS would provide the United States the opportunity to nominate a representative to the Commission on the Limits of the Continental Shelf and to seek clarification of U.S. continental shelf boundaries, thus addressing concerns related to shared continental shelf areas such as the Bering Sea's donut hole and the Arctic waters of the Chukchi and Beaufort Seas.[23] Furthermore, accession could benefit the United States by allowing U.S. participation in the International Seabed Authority and appointment of U.S. representatives to its various subsidiary bodies.[24] Moreover, U.S. accession to UNCLOS would provide the United States with the opportunity to nominate national representatives as judges on the ITLOS and to fully participate in developing the practices of this important global body.

As the status of the International Whaling Commission (IWC) is currently in dispute, some suggest that the United States, if ratifying UNCLOS, might offer a declaration recognizing the IWC as the "appropriate international organization" to regulate cetaceans as a means to marginalize any competing organizations that might seek to offer an alternative model of cetacean management. Such U.S. action might empower and energize the IWC, an organization that the United States has worked hard to develop as a key marine conservation body.

On the other hand, some U.S. interests view U.S. ratification as potentially complicating enforcement of domestic marine regulations. These uncertainties reflect the absence of any comprehensive assessment of the social and economic impacts of UNCLOS implementation by the United States.[25] Although early ITLOS cases do not indicate a problem, some in the United States remain concerned that UNCLOS's language concerning arbitrary refusal of access to surplus (unallocated) living resources might be a potential source of conflict. Additional concerns surround whether and to what extent the United States could regulate ballast water discharges to combat invasive species,[26] supplemental to and in concert with international action taken by the International Maritime Organization (IMO).[27] If UNCLOS is interpreted such that invasive species are covered under the Convention's broad definition of pollution, the United States (and other coastal nations) could be constrained as to what preventive measures could be imposed on ships operating outside our territorial sea.[28]

Proponents of UNCLOS maintain that U.S. participation in the development of policies and practices of the International Tribunal for the Law of the Sea, the Commission on the Limits of the Continental Shelf, and the International Seabed Authority could help to forestall future

[23] For information on the possible redefinition of the extent of the U.S. continental shelf, see http://www.state.gov/e/oes/continentalshelf/.

[24] Additional information on the International Seabed Authority is available at http://www.isa.org.jm/en/home.

[25] Additional information on concerns over other provisions of the Convention is available in CRS Report RS21890, *The U.N. Law of the Sea Convention and the United States: Developments Since October 2003*, by Marjorie Ann Browne.

[26] Additional information on ballast water management is available in CRS Report RL32344, *Ballast Water Management to Combat Invasive Species*, by Eugene H. Buck.

[27] The IMO adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments on February 13, 2004. This convention will enter into force 12 months after ratification by 30 nations, representing 35% of the world merchant shipping tonnage. As of November 11, 2013, 38 countries representing a combined tonnage of 30.38% of the world's merchant fleet have ratified the treaty.

[28] For further discussion of this issue, see the testimony of Vice Admiral Roger T. Rufe, Jr., U.S. Coast Guard (ret.) before the Senate Committee on Foreign Relations on Oct. 21, 2003.

problems related to living marine resources. In addition, they indicate that the Senate could choose to address some of the intentional ambiguities of UNCLOS drafters with its power to make declarations and statements as provided for in Article 310.[29] Such declarations and statements can be useful in promulgating U.S. policy and putting other nations on notice of U.S. interpretation of UNCLOS. A range of issues where U.S. interpretive statements might be helpful was discussed at a Senate Committee on Foreign Relations hearing on October 21, 2003.[30]

Author Information

Harold F. Upton
Analyst in Natural Resources Policy

Acknowledgments

Retired CRS specialist Eugene H. Buck made important contributions to this report.

Disclaimer

[29] Although reservations would have a more substantial legal effect, they are prohibited by Article 309.

[30] Specific issues pertaining to living resources and their marine habitat were discussed in the testimony cited in footnote 28, above.